BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JIM THILL	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,119
MONFORT, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed from a preliminary hearing Order entered by Administrative Law Judge Kenneth S. Johnson on May 16, 1997.

ISSUES

The Administrative Law Judge denied claimant's request for medical treatment based upon a finding that claimant's injury was contributed to by the claimant's use of marijuana. Claimant challenges the Administrative Law Judge's conclusion. Furthermore, claimant challenges the admission into evidence of the drug test results on two grounds: first, that there was not probable cause to believe claimant was impaired by the use of marijuana at the time of the accident and, second, that the foundation evidence did not establish beyond a reasonable doubt that the test results were from the urine samples taken from claimant.

Respondent moved to dismiss claimant's appeal for lack of jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent contends that the Appeals Board has no jurisdiction to entertain claimant's application for review because it does not give rise to one of the jurisdictional issues listed in K.S.A. 1996 Supp. 44-534a(a)(2). That statute provides in pertinent part:

> "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, **or whether certain defenses apply**, shall be considered jurisdictional, and subject to review by the board." (Emphasis added.)

The Appeals Board has previously held that the intoxication defense contained in K.S.A. 1996 Supp. 44-501(d)(2) is the type of defense contemplated by K.S.A. 1996 Supp. 44-534a. *See* Lacerte v. Marks Homes, Inc., Docket No. 175,893 (May 1996); Cockerham v. Nichols Fluid Service, Docket No. 201,867 (Feb. 1996); Sexton v. Barrett Cement Company, Docket No. 193,688 (Nov. 1995); Wolford v. Osman Construction, Docket No. 196,863 (May 1995); Stroud v. Val Gottschalk D/B/A Valentine Roofing & Waterproofing, Inc., Docket No. 195,244 (March 1995); Cooper v. Exide Corporation, Docket No. 184,696 (Jan. 1995). The Board has jurisdiction to hear this appeal from a preliminary hearing order.

K.S.A. 1996 Supp. 44-501(d)(2)(A) provides that the results of chemical tests are not admissible to prove impairment unless "there was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working."

Respondent presented the deposition testimony of Certified Emergency Medical Technician Teddy Mitchell. The Administrative Law Judge relied upon that testimony to find probable cause to believe that claimant was impaired from the use of marijuana while on the job on March 18, 1996.

There was no testimony from any witness concerning claimant's behavior or appearance prior to the accident. The record does not contain any testimony concerning claimant's condition before his accident other than from the claimant himself. Mr. Mitchell testified that he attended to claimant after his injury. According to Mr. Mitchell, claimant's thoughts seemed to be erratic and did not flow in a logical pattern. Also, claimant's eyes were extremely blood shot and his pupils were very dilated. Based on his training and experience, Mr. Mitchell concluded claimant was under the influence of something other than alcohol as he could not smell any odor of alcohol on claimant's breath. As a result, claimant was asked to give a urine specimen. The test results from that specimen were compared to the results from a urine specimen claimant had given previously as a part of his employment physical.

Claimant was injured as a result of a fall from a roof. It seems reasonable to conclude that the erratic thoughts and confused behavior observed by Mr. Mitchell immediately following the accident could have resulted from the fall and injury. Mr. Mitchell admitted that claimant's agitated behavior could have been due to claimant being in extreme pain. However, it seems less probable that the accident alone would account for the other conditions or indicators Mr. Mitchell described as being consistent with an individual being under the influence of drugs. The trier of fact may defer to the training and

experience of the Certified Emergency Medical Technician on the question of what factors are relevant to a determination of whether a person may be under the influence of drugs. Mr. Mitchell's testimony appears reasonable and not improbable in this regard and it can be relied upon to find the probable cause necessary to satisfy the requirements of the statute. Furthermore, Mr. Michell testified that it was respondent's policy to require all employees to submit to urine testing following all slip-and-fall or any OSHA-recordable injury.

K.S.A. 1996 Supp. 44-501(d)(2)(F) provides that in order for the results of a chemical test to be admissible evidence to prove impairment "the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee." Claimant argues that the test results relied upon by the Administrative Law Judge were admitted into evidence without the necessary foundation having been laid. Claimant alleges that respondent failed to establish the chain of custody for both urine samples.

The specific evidentiary requirement established by subsection (F) of K.S.A. 1996 Supp. 44-501(d)(2) is an exception to the general rule that in workers compensation cases the Administrative Law Judge and the Appeals Board are not bound by technical rules of procedure and are to give the parties a reasonable opportunity to be heard and present evidence. *See* McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 772, 921 P.2d 257 (1996). The legislature obviously intended that a much stricter evidentiary standard be applied before the results of a chemical test are admitted into evidence.

As stated above, claimant argues the record fails to establish the foundation contemplated by K.S.A. 1996 Supp. 44-501(d)(2)(F). Respondent argues that the foundation evidence is sufficient. Neither claimant nor respondent cite any authority for their respective positions, nor does either set forth what chain-of-custody testimony should be required to satisfy the statutory requirement.

There are gaps in the chain of custody, as claimant alleges. But those gaps are covered by the testimony of Jac-E Reiser, Roxana Garcia, and Debora Swaim. Claimant points to the interval between the time the specimens left the control of respondent and their arrival at Corning Laboratories. This is the time the specimens were in the possession of Federal Express. Contrary to the assertions of claimant's counsel, testimony from the Federal Express delivery personnel is not necessary. The specimens left Monfort numbered, initialed, and sealed. They arrived at Corning Laboratories still sealed. The identification numbers were checked and recorded each time the samples were handled. This was sufficient to ensure the integrity of the specimens and verify them to be the specimens taken from claimant. *See* State v. Tillman, 208 Kan. 954, 494 P.2d 1178 (1972).

Claimant also raises an objection to the foundation testimony given by Jac-E Reiser, the technical director of the toxicology department at Corning Clinical Laboratories and

records custodian. Her testimony concerning the lab protocol, operating procedures, and chain-of-custody records is competent evidence. It is not necessary for each and every employee of Corning Clinical Laboratories who was involved in the testing process to testify. *See*, e.g., State v. Treadwell, 223 Kan. 577, 575 P.2d 550 (1978). The records, coupled with the testimony of Ms. Reiser, affords adequate protection for the integrity of the process. There is no reasonable doubt in the mind of this fact finder but that the specimens tested and the test results were from the samples taken from claimant.

The record on the chain of custody of the urine samples taken from claimant is voluminous. We will not belabor this opinion with all the particulars. The testimony of each of the witnesses relating to chain of custody of the urine specimens and the foundation for the tests results has been reviewed and it is found to be adequate. The Appeals Board accepts the drug test results which show a negative drug screen from claimant's January 1996 specimen and a positive result from the sample obtained shortly after the accident.

The issue next becomes whether the record establishes that claimant's injury was contributed to by claimant's use of marijuana. Claimant testified that he had been instructed to go up on the roof to turn on a disconnect switch. While walking towards the disconnect switch, he slipped on ice and fell. He stated that a coworker named Ronnie Wade, who was with him on the roof, also slipped and almost fell as well. Claimant described the roof conditions as very unsafe and hazardous. Claimant stated he was being very careful. He denied being under the influence of any drugs.

Respondent presented the testimony of general surgeon Dr. Fred Groves concerning the significance of claimant's test results. Dr. Groves is the corporate Medical Director for respondent. Although he is not considered to be an employee of respondent at this time, he had been in the past and currently does contract work for respondent. He is board certified as a medical examiner which means that he has had specific training in evaluating drug tests. Dr. Groves reviewed the results from the laboratory testing of claimant's post-accident urine specimen. The drug screen was positive for cannabinoids. The cutoff level for a test to be considered positive is 15 nanograms per milliliter. Claimant's specimen was 225 nanograms per milliliter. Dr. Groves opined that claimant was under the influence of marijuana at the time of the urine collection. However, he could not give an opinion regarding whether claimant's being under the influence of marijuana contributed to claimant's slip-and-fall accident. This was because impairment levels had not been set for any drugs other than alcohol. Dr. Groves did say that claimant was "strongly" under the influence as his level was 15 times the allowable cutoff level, but he could not relate this level of influence to claimant's injury. Dr. Groves did not say what effect this level of influence would have upon an individual's ability to function or whether the marijuana caused or contributed to the accident. On cross-examination, at pages 16 and 17 of the deposition transcript, Dr. Groves said he could give a professional opinion as to whether the level of cannabinoids in claimant's system contributed to claimant's work injury on March 18, 1996. However, he was not thereafter asked to and therefore did not give his opinion. About as close as he came to giving an opinion was when he was asked

at page 23 whether it would have affected claimant's ability to climb a ladder, to which he answered "it could have." Dr. Groves said he could not answer whether that level of cannabinoids would have affected claimant's ability to balance himself.

The absence of an expert medical opinion relating to the level of cannabinoids found in claimant's urine to impairment or the ability of claimant to function, together with the absence of any testimony concerning claimant's condition before his accident, leads the Appeals Board to conclude that the record is inadequate to determine that claimant was impaired and that claimant's impairment contributed to his injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the May 16, 1997, Order by Administrative Law Judge Kenneth S. Johnson should be, and is hereby, reversed and this matter is remanded to the Administrative Law Judge for further consideration of claimant's request for medical treatment in accordance with this opinion.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Terry J. Malone, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director